BEFORE THE
PUBLIC SERVICE COMMISSION OF WISCONSIN

Verified Petition of Wisconsin Solar Energy Industries Association to Determine Applicability of Wis. Stat. § 196.01(5) to Third-Party Financing of Distributed Energy Resource Systems in Wisconsin	**)**	**Docket No. 9300-DR-102**

Response of the Environmental Law & Policy Center In Support of Petition

Pursuant to Public Service Commission of Wisconsin ("PSCW" or "Commission") rules, the Environmental Law & Policy Center ("ELPC") files these comments in support of the Wisconsin Solar Energy Industries Association's ("WiSEIA") Petition. Wis. Adm. Code PSC 2.07. WiSEIA filed its petition on October 31, 2017, requesting that the Commission issue a declaratory ruling that a WiSEIA member who enters into power purchase agreements ("PPAs") or leases (collectively, "third-party financing") to supply electricity to customers from solar photovoltaic ("PV") systems and/or PV systems in combination with energy storage devices will not be considered or regulated as a "public utility" under Wis. Stat. § 196.01(5)(a). ELPC strongly supports this petition. Renewable energy developers that provide third-party financing do not fall within the statutory definition of "public utility," nor would regulating them as such meet the underlying purposes of utility regulation. On the other hand, a declaratory ruling that third-party owners of behind-the-meter energy systems are not public utilities would be consistent with Wisconsin law, would create important certainty for Wisconsin businesses, and would help enhance energy security for the schools and families described in WiSEIA's petition.

I. Introduction

ELPC is a not-for-profit public interest environmental legal and eco-business development advocacy organization that works to achieve cleaner air and advance clean renewable energy and energy efficiency resources, and to improve environmental quality and protect clean water and preserve natural resources in Wisconsin and the Midwest. Since 2004, ELPC has had an office and staff in Madison, Wisconsin, and ELPC has members who work and reside in the State of Wisconsin. ELPC has specific expertise related to solar energy development and third-party financing. ELPC represented a group of renewable energy advocates in a recent third-party financing case in Iowa, which culminated with a decision from the Iowa Supreme Court finding that a solar developer's PPA with the City of Dubuque did not make it a public utility under Iowa law. *SZ Enterprises, LLC v. Iowa Utilities Board*, 850 N.W.2d 441 (Iowa 2014). ELPC has also researched and advocated for third-party financing to be permitted in other states around the Midwest. ELPC has published an in-depth analysis of more than 100 years of Wisconsin case law and has published a legal memorandum concluding that third-party financing of distributed generation should not create a "public utility" in Wisconsin. (*See* http://elpc.org/wi-tpo-analysis/).

ELPC is focused on third-party financing because of its potential to enhance energy security, business growth, employment, and competition in the deployment of distributed renewable generation. Third-party PPAs are an innovative financing tool for renewable energy that has been expanding rapidly in various forms over the last few years. Under this mechanism, a developer builds and owns a PV, biogas, or small wind system on a customer's property and recovers the costs of this investment through a long-term contract based on the energy production of the system over time. This financing tool allows property owners to avoid upfront

costs and, often, lock in immediate savings on their electricity bills. PPAs are particularly important for governments, municipalities, schools, non-profits, churches, and other entities that cannot utilize federal or state tax credits for renewable energy, because they allow the third-party owner to take advantage of the tax credits and pass those savings along to customers through lower PPA pricing. In addition to PPAs, on-site renewable energy systems can also be financed through various third-party leasing arrangements in which the project owner recovers the costs of the equipment, installation, maintenance, and other services through a long-term lease with the site host.

As required by Wisconsin law, WiSEIA's petition presents a "concise statement of facts describing the situation as to which the declaratory ruling is requested." Wis. Stat. § 227.41(2)(b). The petition identifies six specific projects ("third-party financed systems" or "TPF systems") that would be financed either through a PPA or a third-party lease and that share each of the following common characteristics:

1. The TPF system is located on the customer's property.
2. The TPF system is installed behind the customer's point of common coupling with the electric grid, typically the customer's electric utility meter.
3. The TPF system is sized to offset a portion of the individual customer's load.
4. The customer enters into a private contract and either leases a TPF system or enters a PPA with the third-party owner for energy-related services.
5. The TPF system is interconnected to the local electric utility's system.
6. The TPF system provides power solely to the customer upon whose property the system is located.
7. If the TPF system's generation exceeds the host customer's load, the system delivers power to the electric utility to which the system is interconnected.[1]

As discussed further below, ELPC agrees that these seven common characteristics are the legally-relevant facts for the purposes of determining whether the developers of the third-party financed systems in WiSEIA's petition should be considered to be "public utilities" under

[1] WiSEIA Petition at 6.

Wisconsin law, and therefore WiSEIA has satisfied the requirement of presenting a concise and clear statement of facts in its petition within the meaning of Wis. Stat. § 227.41(2)(b). Further, it would be unreasonable to require developers to obtain a Commission determination on each and every distributed generation facility that employs third-party financing. Rather, the Commission should make a determination with respect to a standard third-party financing model as illustrated by the seven standard common factual criteria described above and in WiSEIA's petition. Because the relevant facts would stay the same from case to case, a ruling on WiSEIA's petition in this case would provide sufficient clarity for the broader market.

ELPC recommends that the Commission take up the petition and rule in favor of WiSEIA. A formal Commission order stating that third-party owners of distributed generation are not public utilities would create critical certainty for renewable energy development using this financing mechanism to reach its full potential. Although some developers in Wisconsin likely have entered into third-party financing arrangements, many developers have been dissuaded from offering this financing choice to Wisconsin families and businesses due to current legal ambiguity and confusion caused, in part, by prior statements from Wisconsin's electric utilities and Commission staff. The Commission should grant WiSEIA's petition and issue and declaratory order clarifying that third-party financing of on-site, behind-the-meter generation does not create a "public utility" under Wisconsin law.

II. Developers Who Offer Third-Party Financing Are Not Public Utilities Under Wisconsin Law

Renewable energy developers who offer third-party financing for distributed energy systems should not be considered or regulated as public utilities. Regulation of these developers as public utilities would be inconsistent with Wisconsin case law and would not serve the purposes and goals of public utility regulation.

Wisconsin's Public Utilities Act defines "public utility" in relevant part as follows:

> "Public utility" means, except as provided in par. (b), every corporation, company, individual, … that may own, operate, manage or control … any part of a plant or equipment, within the state, for the production, transmission, delivery or furnishing of heat, light, water or power either directly or indirectly ***to or for the public.***

Wis. Stat. § 196.01(5)(a) (emphasis added). The key legal question is whether developers who offer third-party financing deliver or furnish power "to or for the public" within the meaning of the statute. In a long line of opinions, the Wisconsin Supreme Court has held that the legislature never intended to regulate sales of electricity that serve a "limited" or "restricted" class of customers as sales "to or for the public." The "public" in Wisconsin's Public Utilities Act means the public at large, not a limited subset of the public that stands in a special contractual relationship with the facility owner. Further, the purpose of public utility regulation is to protect the public interest at large, not to protect the specific economic interests of Wisconsin's public utilities.

A. Case Law Demonstrates that Service to a "Limited Class" Is Not Service "To or For The Public"

Both Wisconsin Supreme Court cases and Commission decisions support the finding that third-party financed distributed generation would not trigger public utility regulation, as third-party owned generation provides service to a limited class—a class of one.

1. Wisconsin Supreme Court Cases

In *Cawker v. Meyer*, 147 Wis. 320 (1911), a company built a steam plant to serve the tenants in its building, and then contracted to sell surplus electrical power to three neighboring properties. The court found that the company was not a public utility even though it was technically selling light and power to other members of the public. The Court found it "obvious" that the legislature did not intend to sweep in sales to any individual member of the public as

sales "to or for the public" for the purposes of public utility regulation. *Id.* at 324. According to the Court, the key factor is whether or not the product or service "is intended for and open to the use of *all the members of the public who may require it.*" *Id.* at 325 (emphasis added). Because the purpose of the plant was primarily to serve a "restricted class"—the tenants of the owners and a few neighbors—the Court determined that the generator was not a public utility. *Id.*

Cawker supports a conclusion that third-party financing of on-site generation should not trigger public utility regulation in Wisconsin. Just like the steam generator in *Cawker*, on-site generation financed through a PPA is intended to serve a "restricted class"—indeed, a class of one. Just as in *Cawker*, the customer relationship is defined explicitly by the "contract relationship" and "nearness of location" to the system owner and the energy is neither "intended for" nor "open to" all members of the public. *See id.* at 325-26. Instead, the "sale" of electricity under a PPA contract is "strictly incidental" to the primary purpose to provide private, behind-the-meter services via contracts with individual customers. *See id.* Under *Cawker*, PPAs for on-site generation should be considered private contracts, not public utility services.

Cawker remains good law in Wisconsin, having been followed by the Wisconsin Supreme Court in subsequent cases and regularly cited by the Commission in its orders and decisions. For example, in *City of Sun Prairie v. PSCW*, 37 Wis. 2d 96 (1967), the Wisconsin Supreme Court determined that a landlord company that provided heat, electricity, and water to the tenants of its apartment building was not a public utility even though the building owner "will house up to 1,000 people" and "will rent an apartment 'to any responsible person' who is able to pay the rent." *Id.* at 98 (case syllabus). Similarly, "any responsible person" may sign a PPA contract with a third-party owner. However, cases like *Cawker* and *City of Sun Prairie* make clear that the appropriate focus is on the *individual facility in question* and not the fact that

any member of the public may decide to sign a PPA. If the purpose of the facility is to serve a "limited class" and not the public at large, then *Cawker* is "determinative." *Id.* Although a developer might construct third-party owned generation facilities for numerous customers, each individual facility would only serve a single customer.

Other Wisconsin cases reaffirm the same principle that service to a limited class is not service "to or for the public." In *Schumacher v. Railroad Commission*, 185 Wis. 303 (1924), the court considered whether "a group of neighbors who have co-operated to build a line to supply themselves with electric current" constituted a public utility. *Id.* at 305. The Wisconsin Supreme Court agreed with the district court that they were not a public utility, as they had no purpose "of serving the public generally or any portion of the public outside of those who voluntarily band themselves together." *Id.*

In *Ford Hydro-Electric Company v. Town of Aurora*, 206 Wis. 489 (1932), a hydropower company owned mostly by the Ford Motor Company built a dam and provided power directly and solely to a Ford Motor Company factory. The Court found that the sole purpose of the plant was to sell to one customer and that it was "not built or operated for furnishing to the public generally." *Id.* at 497. Thus, the hydropower company was not a public utility. A few years later, the Wisconsin Supreme Court found that a power company that furnished electricity to a city was not providing service to or for the public. In *Union Falls Power Co. v. Oconto Falls*, 221 Wis. 457 (1936), the court examined a contract in which Union Falls agreed to furnish electricity to Oconto Falls under a PPA contract. The Court determined that Union Falls was not a public utility, because it "makes no offer to serve the public which could be accepted by any member of the public." *Id.* at 461.

The *Cawker* line of cases compels a conclusion that third-party owners of behind-the-meter generation are not "public utilities." Just as in *Cawker, City of Sun Prairie, Ford Hydro-Electric*, and *Union Falls Power, ,* the electricity generated by an on-site generator under a PPA contract is not "intended for and open to the use of all the members of the public who may require it." *See Cawker*, 147 Wis. at 325. The PPA contracts are intended for one customer only and vary widely depending on site-specific roof conditions, climate, individual customer needs, and many other factors. Third-party developers do not make offers that "could be accepted by any member of the public." *See Union Falls Power Co.*, 221 at 461. In fact, according to the National Renewable Energy Laboratory, only about one-quarter of residential rooftops are suitable for solar PV systems. The Public Utilities Act was never intended to "abridge the right to contract" for on-site power from a third-party owner that is not "intended for" nor "open to" all members of the public. *See Cawker*, 147 Wis. at 325-26.

2. Public Service Commission of Wisconsin Decisions

The Commission has reached several decisions in recent years following *Cawker*'s reasoning. For example, in a 2006 case in which a company requested that it retain its public utility status, the Commission ruled that Consolidated Water Power Company (CWP) would no longer remain a public utility if it only provided retail electric service to a small area "encompassing four small commercial customers and a vacant parcel," as well as to facilities owned by CWP's parent company. Final Decision, *Application of Consolidated Water Power Company and Wisconsin Public Service Corporation for All Approvals Required for Sale of Electric Distribution Facilities*, PSC Docket No. 5-BS-146 (June 30, 2006). Quoting *Cawker*, the Commission held that "the word 'public' *must be construed to mean more than a limited class* defined by the relationship of landlord tenant or the nearness of location, as neighbors, or more

than a few who by reason of any particular relation to the owner of the plant may be served by him." *Id.* at 8 (emphasis in original). Although on reconsideration, the Commission allowed CWP to continue operation as a public utility, it emphasized that "public utility laws exist for the protection of the consuming public, not the competing utilities." Final Decision, *Petition of Consolidated Water Power Company for a Declaratory Ruling as to its Status as a Public Utility*, PSC Docket No. 5-DR-108, at 5 (Nov. 8, 2007).

In a recent decision, the Commission found that Wisconsin Regional Medical Center Thermal Service, Inc. (MRMC Thermal) would not become a public utility if it purchased assets to provide steam service to six medical center members, explaining that "the steam would be provided to a limited class." Final Decision, *Application of Wisconsin Electric Power Company for Authority to Transfer Milwaukee County Power Plant and Related Steam Distribution Assets*, Docket No. 6630-BS-101 (Jan. 15, 2016).

While the Commission has not taken a definitive position on the specific issue of third-party financing of distributed generation, it did recently reject a utility's request for a "blanket prohibition" on third-party financing. Final Order, *Joint Application of Wisconsin Electric Power Company and Wisconsin Gas LLC, both d/b/a We Energies, for Authority to Adjust Electric, Natural Gas, and Steam Rates*, Docket 5-UR-107, at 89 (Dec. 23, 2014).

Despite this extensive precedent, however, two letters authored by members of the Commission's staff have expressed the informal opinion that third-party owners should be regulated by the Commission as public utilities. In a February 2012 letter to Representative Gary Tauchen, the PSCW's Division Administrator for Gas and Energy opined that, in general, solar or biogas companies that offer to finance on-site renewable energy systems using third-party PPAs "could not do business in Wisconsin without first receiving a certificate of authority from

the Commission to operate as public utilities." Letter from Robert Norcross, Division Administrator, to Representative Gary Tauchen, at 2 (Feb. 8, 2012). In April 2014, the Commission's Chief Legal Counsel provided a follow-up letter to Madison Gas and Electric confirming that the 2012 letter to Representative Gary Tauchen "remains an accurate description of the Commission staff's view of the law," although it notes that the letters "are not formal statements of Commission policy." Letter from Cynthia Smith, Chief Legal Counsel, to Gregory Bollom, Madison Gas and Electric Company, at 1 (Apr. 3, 2014). In a later case, the Commission made clear that these two staff letters "do not constitute a formal determination by this Commission." Final Order, *Joint Application of Wisconsin Electric Power Company and Wisconsin Gas LLC, both d/b/a We Energies, for Authority to Adjust Electric, Natural Gas, and Steam Rates*, Docket 5-UR-107, at 89 (Dec. 23, 2014).

Staff's informal opinion letters would overturn long-established precedent, infringe on private rights of contract, and expand the scope of the Commission's regulatory powers beyond that intended by the legislature. As explained above, a long line of Wisconsin cases support the more conservative view of the law that government regulation should only extend as far as necessary to protect the public interest. Moreover, the 2012 and 2014 letters from Commission staff were intended to provide informal guidance and not authoritative positions. The letters did not, nor were they intended to, provide an in-depth analysis of Wisconsin case law or the underlying policy rationale for public utility regulation in Wisconsin. As noted in the April 2014 letter to Madison Gas and Electric, the letters "will not be considered precedential should the full Commission open a docket on these subjects." *Id.*

B. Third Party Financing of Distributed Generation Raises None of the Public Interest Concerns That Justify Public Utility Regulation

While *Cawker* and its progeny should settle the issue standing alone, there are many other reasons why regulating third-party owners as public utilities would stretch Wisconsin's public utility law well beyond its legislative purposes and goals. In particular, third-party owners share none of the characteristics of "public utilities" that the legislature had in mind when adopting the Wisconsin Public Utilities Act.

Public utility regulation was developed to benefit and protect the public. This protection was considered necessary due to the monopoly power of public utilities and other special powers granted to utility companies by the government. First common carriers, and later, public utilities, were formed when the government granted a charter for a private corporation in a situation of natural monopoly—where infrastructure was costly enough to create a barrier to entry into the market, competition would lead to duplicative infrastructure, and there were significant economies of scale. Because these companies provided what was seen as a necessary service, the government granted them special privileges so that they could be practically and economically viable. The requirements of a "fair" rate of return and full recovery of "reasonable" operating expenses, for example, are designed to serve the public interest by "enabl[ing] the company to live up to its obligations to serve the community." James C. Bonbright, *Principles of Public Utility Rates* 50 (1961).

1. Public Interest Purpose

The Wisconsin Supreme Court has repeatedly announced that "the predominant purpose underlying the public utilities law is the protection of the consuming public rather than the competing utilities." *Wisconsin Power & Light Co. v. Public Service Comm'n*, 45 Wis. 2d 253, 259 (1969). In a very early case, *Shepard v. Milwaukee Gas Light Company*, 6 Wis. 539 (1858),

the Wisconsin Supreme Court discussed the underlying purposes for granting special privileges to gas companies, and for requiring certain duties be performed by gas companies. The court expressed reservations about monopolies and explained that they should be "tolerated" only where necessary to serve the public interest and "always imply a corresponding duty to the public to meet the convenience or necessity which tolerates their existence." *Id.* at 547. The court in *City of La Crosse v. La Crosse Gas & Electric Co.*, 145 Wis. 408, 421 (1911), explained that a purpose of the public utility law was to ensure "the best service practicable at reasonable cost to consumers." The court echoed this statement the following year in *Calumet Service Co. v. Chilton*, 148 Wis. 334, 363 (1912).

The U.S. Supreme Court has explained that the need for public regulation "depends on the nature of the business, on the feature which touches the public, and on the abuses reasonably to be feared." *Charles Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522, 538 (1923). A state's power to regulate rates and prices typically arises where there is an "indispensable" service that would subject the public to the risk of "exorbitant charges and arbitrary control" without regulation. *Id.* While the process of ratemaking "involves a balancing of the investor and the consumer interests," the Court has been clear that the "primary aim" of utility regulation is the protection of the consuming public. *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 603, 610 (1944).

There is no clear public interest rationale for regulating third-party owners as public utilities. Indeed, prohibiting PPA financing in Wisconsin would invert the purpose of the statute by effectively protecting public utilities at the expense of their customers.

2. Natural Monopoly

The existence of a natural monopoly is one of the factors that traditionally justifies public utility regulation. One important element in the "conditions which produce monopoly" is the "absence of a substitute." Bruce Wyman, *The Law of the Public Callings as a Solution of the Trust Problem*, 17 Harv. L. Rev. 156, 172 (1903). Early electric and gas industry customers were at the mercy of monopoly providers because they had no alternative way to provide themselves with these essential products in the market.

Thus, courts have historically distinguished between ordinary goods and services that can be bargained for in a competitive market and those that are "clothed in a public interest" because they present an "inevitable monopoly" in their supply. An early law journal article explains:

> What, after all, is that element in the situation which differentiates the vending of candles from the purveying of gas? Is it not this,—that the box of candles may be sent from any factory into any market, a condition which preserves virtual competition in the sale of candles; while a thousand feet of gas can only be got by the consumer from the local gas company, a situation which presents an inevitable monopoly in the supplying of gas.

Wyman, *supra*, at 169. The Wisconsin Supreme Court similarly explained that if natural gas was more like "an article of merchandise, [that] could be bottled or packed up, and imported or exported like 'soap, candles or hats,'" then public utility regulation would not be necessary. *Shepard*, 6 Wis. at 545. The same natural monopoly justification was used to explain regulation of electricity service, as that industry developed. Wyman, *supra*, at 171.

With distributed generation, of course, this natural monopoly justification does not apply. Solar developers do not enjoy an "inevitable monopoly" and must compete vigorously in the market. Solar developers are much more like vendors of "merchandise . . . like soap, candles or hats" than railroad barons or gas company monopolists.

3. Dedication to Public Use

Another factor that justifies public utility regulation is where goods or services are "clothed in the public interest" due to their great public importance or dedication to public use. In the seminal case of *Munn v. Illinois*, 94 U.S. 113 (1877), the U.S. Supreme Court upheld an Illinois law setting prices for grain warehouses. The Court opined that "[p]roperty does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large." *Id.* at 126. In finding that grain warehousing was "clothed with a public interest," the Court focused on the importance of the grain trade, the practical necessity of using grain warehouses when participating in the grain trade, and the virtual monopoly on providing grain warehousing. In contrast, the general public does not have an interest in another person's behind-the-meter solar, biogas, or small wind system.

4. Public vs. Private Infrastructure

The use or reliance on public infrastructure is also an important factor in determining whether an entity is a "public utility." In *Ford Hydro-Electric Company*, the Wisconsin Supreme Court determined that the physical nature of the plant in question indicated that it was intended for only one customer and not the "public generally." 206 Wis. at 496. Similarly, in *Chesapeake & Potomac Telephone Co. v. Manning*, 186 U.S. 238 (1902), the U.S. Supreme Court explained that private telephone services located entirely within a private building are not subject to public regulation of rates, even if they are provided by a public telephone company that would otherwise be subject to rate regulation. This internal telephone service is "no more public in its nature than the speaking tubes or call bells in a building." *Id.* at 247.

Like the generating plant in *Ford Hydro-Electric* and the private telephone service in *Chesapeake & Potomac*, a distributed generation system is located entirely on the private

property of a single customer and is intended only to serve that customer. No public utility infrastructure is involved and public utility regulation would be inappropriate.

5. Avoiding Duplication of Service

The court in *Wisconsin Traction Light, Heat & Power Co. v. Menasha*, 157 Wis. 1 (1914), explained that the public utility law was "undoubtedly framed on the theory that certain kinds of business were of such a character that the duplication of plants for the purpose of carrying them on was undesirable because it resulted in an economic waste, the loss from which in the end usually fell upon the consumer." *Id.* at 7. The court elaborated: "One of the main purposes of the law was to avoid duplication, and it was thought that by efficiently controlling the rates to be charged by a single utility the consumer would derive the benefit resulting from economy in production." *Id.* at 8. With on-site generation, of course, there is no duplication and there is no need for uniform prices to protect the consuming public. Solar and other on-site renewable energy services are provided by many participants in a competitive market, and there would be no benefit to limit customer choice to a single utility. In fact, at present there are no utilities in Wisconsin that offer their customers the choice of distributed generation.

6. Protection against Unequal Bargaining Power

In *Superior Water, Light & Power Co. v. Superior*, 174 Wis. 257 (1921), the court explained that state regulation of utility businesses was intended to help address the inherent imbalance in power between monopoly utilities and municipalities. In contrast, third-party owners do not have undue influence or unequal bargaining power over their customers. Third-party owners operate in competitive markets and negotiate arms-length contracts with customers. As the Iowa Supreme Court recently explained, "[t]here is simply nothing in the record to suggest that [solar developer] Eagle Point is a six hundred pound economic gorilla that has

cornered defenseless city leaders in Dubuque." *SZ Enterprises, LLC v. Iowa Utilities Board*, 850 N.W.2d 441, 467 (Iowa 2014). Public utility regulation is not necessary to correct an imbalance in customer bargaining power for behind-the-meter energy systems.

7. Respect for Private Property and Private Contract

Courts have been generally unwilling to extend public utility jurisdiction into areas that would infringe on private property and private rights of contract without a clear public interest justification. In *Chippewa Power Co. v. Railroad Commission of Wisconsin*, 188 Wis. 246 (1925), the Court declined to extend state jurisdiction over a private contract to lease land and a hydropower plant to a public utility, claiming that extending regulation over this business contract could subject many other kinds of "purely private contracts" to regulation by the Commission. According to the Court, "[a] line or distinction must definitely be drawn somewhere, and, unless this be done, the constitutional provisions pertaining to the ownership, control, and management of private property will be completely submerged." *Id.* at 251. The Court has warned that agencies of the state are to exercise their jurisdiction only so far as necessary to serve the public interest and no farther. Id. at 253.

The Wisconsin Supreme Court's approach in this and other cases reflects a fundamentally conservative approach to public regulation that is particularly relevant to third-party financing of distributed generation. Defining third-party owners as "public utilities" would require the state to override private business contracts for competitive services on the private property of Wisconsin homes and businesses to protect the market share of state-sanctioned monopolies. This would not serve the purposes of the Public Utility Act and would cross the public/private line that has been "firmly and definitely fixed" by the Wisconsin Supreme Court. *See Chippewa Power Co.*, 188 Wis. at 253.

III. Neighboring States Do Not Regulate Third-Party Owners as Public Utilities

Several of Wisconsin's neighbors allow third-party financing of behind-the-meter solar without regulating the developers as public utilities, including Iowa, Michigan, and Illinois. In 2014, the Iowa Supreme Court issued an opinion on the issue, finding that Eagle Point Solar's PV PPA contract with the City of Dubuque did not make it a public utility under Iowa law. *SZ Enterprises, LLC v. Iowa Utilities Board*, 850 N.W.2d 441 (Iowa 2014). The Court employed a multifactor test, as in Wisconsin, to "determine whether the transaction cries out for public regulation" and followed the "conservative principle" that "jurisdiction should be extended 'only as necessary to address the public interest implicated.'" *Id.* at 456, 466. ELPC represented a coalition of clean energy organizations in the Iowa case and is therefore very familiar with the balancing of public interest factors applied by the Iowa Supreme Court and the similarity to Wisconsin law.

Iowa's analysis of public interest factors is very similar to Wisconsin's. For example, the Iowa court looked beyond the mere fact that Eagle Point's PPA involved a sale of electricity and conducted a more "pragmatic assessment of what is actually happening in the transaction." *Id.* at 466. The Iowa court found that the solar panels on Dubuque city rooftops were not dedicated to a public use, and that on-site solar energy is an optional service, not an "indispensable service that ordinarily cries out for public regulation." *Id.* As the Court observed:

> All of Eagle Point's customers remain connected to the public grid, so if for some reason the solar system fails, no one goes without electric service. Although some may wish it so, behind-the-meter solar equipment is not an essential commodity required by all members of the public.

Id. Similarly, the Iowa Court found that Eagle Point "is not producing a fungible commodity that everyone needs" like "water that everyone old or young will drink, or natural gas necessary to run the farms throughout the county." *Id.* Instead, Eagle Point is providing a "customized service

to individual customers." All of these factors cut against a finding that Eagle Point's service was "clothed in the public interest." The Court also found that Eagle Point was not a natural monopoly nor did it exert unequal bargaining power over its customers. Indeed, the court characterized Dubuque's PPA as a "low risk transaction"; Dubuque owes nothing unless the solar panels actually produce electricity. *Id.*

The case law is in Wisconsin is even more favorable to third-party ownership than the precedent in Iowa was before the 2014 decision. The Iowa Supreme Court did not have the benefit of precedent like the *Cawker* line of cases. It had to rely on the application of a multi-factor test from *Iowa State Commerce Commission v. Northern Natural Gas Co.*, 161 N.W.2d 111 (Iowa 1968), a case in which the court determined that the natural gas company was a public utility. The Iowa Supreme Court looked to what the developer in *SZ Enterprises* was really doing and whether public utility regulation was appropriate. The case law in Wisconsin is even more supportive of third-party financing in light of *Cawker's* clear holding that service to a "limited" or "restricted" class of customers is not sales "to or for the public" within the meaning of Wis. Stat. § 196.01(5)(a). An order by the Commission finding that third-party owners are not public utilities is clearly supported by Wisconsin case law and the principles underlying Wisconsin's Public Utilities Act.

IV. Conclusion

The Wisconsin Supreme Court has consistently held that a company providing electricity to a limited class of customers, rather than to the general public, is not a public utility. Furthermore, none of the key factors for regulating public utilities in Wisconsin apply to third-party owners of DG systems, which have inherently different characteristics. The Commission should not extend its jurisdiction over private, third-party contractual agreements that help

Wisconsin families, schools, and businesses save money while becoming more self-sufficient. ELPC strongly supports WiSEA's Petition for an Order stating that third-party owners of distributed generation are not public utilities under Wisconsin law.

Respectfully submitted,

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Certificate of Service

I hereby certify that a copy of *Response of the Environmental Law & Policy Center In Support of Petition* has been served by electronic mail (e-mail) to all parties listed on the Service List.

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